Yunley Enterprise Sdn Bhd v Loh Seng Lee and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS 08(i)–187 OF 2008 (P) AND 08(i)–188 OF 2008 (P)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), NIK HASHIM AND HASHIM YUSOFF FCJJ
3 NOVEMBER 2009

Civil Procedure — Appeal — Application for leave to appeal — Applicant filed originating summons seeking declaration that auction and sale of properties be declared void ab initio — Judicial commissioner allowed applications — Court of Appeal reversed judicial commissioner's decision — Applicant filed applications for leave to appeal to Federal Court on five questions — Whether questions posed were novel point of law — Whether questions posed would have effect reversing decision of Court of Appeal — Whether threshold requirement of s 96(a) of the Courts of Judicature Act 1964 fulfilled — Courts of Judicature Act 1964 s 96(a)

Land Law — Charge — Order for sale — First respondent granted banking facilities to applicant — Applicant default in payment — First respondent commenced foreclosure proceedings — Properties auctioned off by land administrator — Second respondent purchased properties — Applicant filed originating summons seeking declaration that auction and sale of properties be declared void ab initio — Whether properties ought to be offered for sale individually — National Land Code ss 257 & 263

The first respondent had granted banking facilities to the applicant which were secured by charges on two properties. On default of payment by the applicant, the first respondent filed a suit against the applicant to recover the monies due to it in respect of the said banking facilities. Pending the said action, the first respondent commenced foreclosure proceedings in respect of the said charges whereby the two properties were auctioned off by the land administrator and were purchased by the second respondent. The applicant then filed an originating summons ('OS') seeking declaration that the auction and sale of the two properties to the second respondent be declared void ab initio. The judicial commissioner granted an order in terms of the said OS. The first respondent's appeal to the Court of Appeal was allowed, hence, the applicant filed the present applications seeking leave to appeal against the decision of the Court of Appeal. The applicant posed five questions for the court's consideration. In relation to the questions posed, the applicant submitted that the provisions of s 257(2) and (3) of the National Land Code ('the NLC') shall apply mutatis mutandis to s 263 of the NLC, as such, the said properties ought to be offered for sale individually. However, the first respondent argued that the

said five questions posed in these two applications referred to the validity of the order for sale and not regarding how the auction was carried out. The answers to these questions were obviously well settled.

Held, dismissing the applications with costs:

(1) The five issues raised were not novel point of law as they had been dealt with by this court earlier. At any rate, on careful reading of s 257(2) of the NLC, the court did not see any prohibition for the said properties to be offered for sale collectively. Moreover, it would be an exercise of discretion by the court under the particular circumstances of the case whether the lands charged were to be sold individually or collectively. This would be a question of fact only (see paras 21–22).

(2) The questions posed would not have the effect of reversing the decision of the Court of Appeal, as from the evidence available, there was no prima facie chance of success for the applicant at the appeal proper even if leave was given. Based on the above reasons, the court found that the applicant had failed to cross the threshold requirement of s 96(a) of the Courts of Judicature Act 1964 (see paras 22–23).

[Bahasa Malaysia summary

Responden pertama telah memberikan kemudahan perbankan kepada pemohon yang dijamin dengan caj ke atas dua hartanah. Atas kegagalan pemohon untuk membayar, responden pertama telah memfailkan saman terhadap pemohon untuk mendapatkan semula wang yang terhutang disebabkan oleh kemudahan perbankan tersebut. Sementara menunggu tindakan tersebut selesai, responden pertama telah memulakan tindakan melelong berkenaan dengan caj tersebut di mana kedua-dua hartanah tersebut telah dilelong oleh pentadbir tanah dan dibeli oleh responden kedua. Pemohon kemudian memfailkan saman pemula ('SP') yang menghendaki pengisytiharan bahawa lelongan dan penjualan kedua-dua hartanah tersebut kepada responden kedua diisytiharkan tidak sah dari awalnya. Pesuruhjaya kehakiman memberi perintah seperti yang dipohon di dalam SP tersebut. Rayuan responden pertama kepada Mahkamah Rayuan telah dibenarkan, oleh itu, pemohon memfailkan permohonan semasa untuk mendapatkan kebenaran merayu terhadap keputusan Mahkamah Rayuan. Pemohon mengemukakan lima soalan untuk pertimbangan mahkamah. Berhubung dengan soalan-soalan yang diajukan, pemohon berhujah bahawa peruntukan s 257(2) dan (3) Kanun Tanah Negara ('KTN') terpakai secara mutatis mutandis kepada s 263 KTN, oleh itu, hartanah tersebut mesti ditawarkan untuk dijual secara individu. Walau bagaimanapun, responden pertama berpendapat bahawa lima soalan yang dikemukakan dalam kedua-dua permohonan ini merujuk kepada kesahihan perintah jualan dan bukan mengenai bagaimana lelongan dijalankan. Jawapan kepada soalan-soalan ini jelas telah diselesaikan dengan baik.

Diputuskan, menolak permohonan-permohonan dengan kos:

(1) Lima isu yang dibangkitkan bukanlah hukum undang-udang yang baru kerana ia telah ditangani dengan lebih awal oleh mahkamah ini. Walau bagaimanapun, berdasarkan penilitian ke atas s 257(2) KTN, mahkamah tidak menjumpai apa-apa larangan untuk hartanah tersebut ditawarkan untuk dijual secara kolektif. Selain itu, ia adalah di dalam budi bicara mahkamah berdasarkan keadaan tertentu kes untuk menentukan sama ada tanah yang dicajkan akan dijual secara individu atau secara kolektif. Ini akan menjadi persoalan fakta sahaja (lihat perenggan 21–22).

(2) Persoalan-persoalan yang ditimbulkan tidak akan memberi kesan mengubah keputusan Mahkamah Rayuan kerana berdasarkan keterangan yang ada, tidak ada peluang prima facie untuk pemohon berjaya pada rayuan sebenar walaupun kebenaran diberikan. Berdasarkan sebab-sebab di atas, mahkamah mendapati bahawa pemohon telah gagal memenuhi keperluan yang ditetapkan di bawah s 96(a) Akta Mahkamah Kehakiman 1964 (lihat perenggan 22–23).]

Notes

For cases on application for leave to appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1075-1076.

For cases on order for sale, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2917-3094.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Arab Malaysian Finance Bhd v Shamsudin Ahmad & Anor [1997] 4 CLJ Supp 469 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors [1990] 1 MLJ 185; [1990] 1 CLJ 58; [1990] 1 CLJ (Rep) 657, HC (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another appeal [1998] 2 MLJ 137; [1999] 1 CLJ 325, CA (refd)

Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141; [1996] 3 CLJ 494, CA (refd)

Sun Kee & Co v Chop Sin Hua Hin & Anor [1981] 2 MLJ 327; [1981] 1 LNS 18, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96, 96(a)

National Land Code Forms 16D, 16P, 16G, ss 254, 257(2), (3), 260,

263, (1), (3), 264, 269, 418

RK Nathan (Vinod RK Nathan with him) (Vinod Kamalanathan & Assoc) in Civil Application Nos 08(i)–187 of 2008(P) and 08(i)–188 of 2008(P)for the plaintiff.

Tan Swee Cheng (Cheong Wai Meng & Van Buerle) in Civil Application No 08(i)–187 of 2008(P) for the respondent.

Lambert Rasa-Ratnam (Lee Hishammuddin Allen & Gledhill in Civil Application No 08(i)–188 of 2008(P) for the first respondent.

Tan Swee Cheng (Cheong Wai Meng & Van Buerle) in Civil Application No 08(i)–188 of 2008(P) for the second respondent.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] The applicant, by two notices of motion 08(i)–187 of 2008 (P) and 08(i)–188 of 2008 (P) both dated 22 August 2008 ('encl 2(a)') applied for leave to appeal to this court. Five questions were originally posed for the consideration by this court as follows:

(1) whether s 257(2) read together with s 263(3) of the National Land Code ('the NLC') renders it mandatory rather than discretionary in cases where the charge in question relates to more lands than one, that the lands be offered for sale individually and therefore whether an order for sale made by a land administrator for the sale of lands held under one charge collectively rather than individually is an illegal order or one that is a nullity being in breach of s 257(2) of the NLC;

(2) in the event the answer to question (1) is in the affirmative, whether an auction carried out pursuant to such an illegal order or one that is a nullity is similarly rendered illegal or is a nullity itself;

(3) in the event the answer to questions (1) and (2) are in the affirmative, whether a chargor who is aggrieved by the consequences of an auction carried out pursuant to such an illegal order or one that is a nullity may apply to the High court for a declaration that the said auction and any sale of property thereunder is null and void ab initio or whether such a chargor is bound to lodge an appeal against the impugned order for sale pursuant to s 418 of the NLC in order to challenge the validity of the auction and/or the sale of property thereunder;

(4) whether a chargee is entitled to proceed with foreclosure proceedings over charged property based on a Form 16D issued pursuant to s 254 of the NLC in respect of a previous application by the chargee for foreclosure over the same property where the Form 16D has subsequently been cancelled by the issuance of a Form 16P pursuant to s 264 of the NLC; and

(5) whether a chargee is entitled to proceed with foreclosure proceedings over charged property based on a Form 16D issued pursuant to s 254 of the NLC more than five years prior to the issuance of the Form 16G pursuant to s 260 of the NLC.

[2] At the outset of hearing the application, learned counsel for the applicant applied to amend question no (1) in both notices of motion by replacing the word 'one' with the word 'two' in the words 'one charge'. After hearing arguments from both sides we unanimously dismissed these applications. We now give our reasons.

BRIEF FACTS

[3] By a letter of offer dated 7 September 1996 the first respondent granted a term loan overdraft and other banking facilities ('the said banking facilities') to the applicant which were secured by charges on various properties registered in the name of the applicant. Two of the said charges Perserahan Nos 1922/96 and 1923/96 ('the said charges') were over two properties registered in the name of the applicant and held under Lot 686 Mukim No 571 and Lot No 572, Mukim I, Daerah Seberang Perai Selatan, Penang ('the said properties').

[4] The propriety and lawfulness of the foreclosure action taken by the first respondent pursuant to the said charges and in relation to the said properties is now the subject matter of these applications.

[5] When the applicant defaulted in its repayment, the first respondent took out a suit against the applicant to recover the monies due to it in respect of the said banking facilities vide Kuala Lumpur High court Civil Suit No D2–22–158 of 1998. Summary judgment was initially obtained against the applicant which was subsequently overturned on appeal to the judge in chambers. The High court's decision was upheld on appeal by the first respondent to the Court of Appeal and the matter is now at the stage of case management in the High Court.

[6] In 2003, pending the civil proceedings, the first respondent commenced foreclosure proceedings in respect of the said charges. On 13 May 2005, the two properties were auctioned off by the land administrator, Seberang Perai Selatan and were purchased by the second respondent at the said auction.

[7] The applicant then filed the originating summons ('OS') No MT3–24–1279 of 2005 dated 19 August 2005 in the High Court at

Penang seeking, inter alia, a declaration that the auction on 13 May 2005 and the sale of the two properties thereunder to the second respondent be declared null and void ab initio.

[8] On 31 May 2007 the learned judicial commissioner granted an order in terms of the said OS with consequential relief.

[9] On 23 July 2008 the Court of Appeal allowed the first respondent's appeal against the said learned judicial commissioner's order. As a result, the applicant is now seeking leave of this court to appeal against the decision of the Court of Appeal.

SUBMISSION BY COUNSEL

[10] Learned counsel for the applicant raised two issues. Firstly he submitted that since the two properties were with the land office title, therefore they would have to be sold pursuant to ss 260 and 263 of the NLC (see *Arab Malaysian Finance Bhd v Shamsudin Ahmad & Anor* [1997] 4 CLJ Supp 469). He further submitted that s 263(1) of the NLC gives the land administrator the power to 'order the sale of the land ... to which the charge in question relates ...'. It was submitted that s 263(1) means that the power is to order the sale of the land individually and not to order the sale of the said properties, jointly.

[11] Further it was argued that the provisions of s 257(2) and (3) of the NLC shall apply 'mutatis mutandis' to s 263. It therefore means that the said properties must be offered for sale individually as provided in s 257(2) of the NLC. If there was non-compliance of s 257(2) of the NLC, it was submitted that the sale order was illegal and therefore could not be enforced (see *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; [1996] 3 CLJ 494). Reference was also made to the case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC) where this court held that where an order of court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside.

[12] It was also submitted by learned counsel for the applicant that by not auctioning the said properties individually, the first respondent had breached its fiduciary obligations to the applicant by failing to secure the best price for the said properties. According to a valuation report by Messrs Ernest Chung dated 3 September 2002 (exh 'KKH4' in *Jld* 2 pp 579–606), the said properties were valued separately as follows:

(a) Lot 694 was valued at RM750,000; and

(b) Lot 686 was valued at RM1,050,000.

[13] But the first respondent fixed a price of RM1,152,000 as the total value of the said properties, to be jointly auctioned. It was therefore submitted that the first respondent had neither obtained the best value for the said properties nor had the best interest of the applicant at hand (see *Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors* [1990] 1 MLJ 185; [1990] 1 CLJ 58; [1990] 1 CLJ (Rep) 657).

[14] In his reply, the learned counsel for the first respondent submitted that all the five questions posed in these two applications refer to the validity of the order for sale and not regarding how the auction was carried out. The answers to these questions are obviously well settled.

[15] It is the first respondent's contention that the first three questions posed are premised on the issue whether s 257(2) prohibits the sale of the said properties collectively? Learned counsel argued that it does not.

[16] He further submitted that by virtue of s 418 of the NLC, any party who is dissatisfied with the order for sale 'may at anytime within the period of three months beginning with the date or which it was communicated to him, appeal therefrom to the court'.

[17] Likewise, learned counsel for the second respondent (the purchaser) also submitted that the five questions posed only refer to the non-compliance of the provisions of the NLC.

[18] However, he argued that at the material time of the auction (13 May 2005), the second respondent was a bona fide purchaser for value and he was not made aware of any notice of the ex parte application for injunction by the applicant. That being the case it was submitted that the second respondent had therefore acquired good title of the said properties which he purchased at the auction (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133). He further referred to s 269 of the NLC which provides for the protection of purchaser.

DECISION OF THE COURT

[19] It should be borne in mind that this is an application for leave to appeal to this court. Section 96 of the Courts of Judicature Act 1964 ('the CJA') therefore comes into play.

[20] In *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another appeal* [1998] 2 MLJ 137; [1999] 1 CLJ 325 this court, inter alia, held:

[1] The application for leave to appeal to this court should set forth shortly, the facts and points of law of such general importance to make it appropriate for the consideration of this court and conclude with summarised reasons for leave to be granted. At the hearing, the argument, so far as it is possible, should be brief, succinct and concentrated.

[2] The circumstances for granting leave application in the Federal Court are not limited to the two situations stated in s 96(a) of the Act. Whilst the situations stated therein, namely 'a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage' constitute the paramount considerations, they are not exclusive. An assessment of the prospects of success should leave be given is an important factor which the Federal Court must also consider. This aside, leave may also be granted, inter alia, upon consideration: (i) of the utility of the decision of the Federal Court on the question of law as a means either to clarify or develop a general principle of law; (ii) that there was a dissenting judgment in the Court of Appeal; and (iii) of the need to authoritatively restate the relevant law. It is to be noted, thus, that in applications for leave to appeal to this Court, 'public importance' will have to be weighed against the features of the particular litigation.

[3] The Federal Court, in any case, would exercise its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless *both* of the following criteria are satisfied by an intending appellant, namely (i) that the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage, and (ii) if so, that there is a prima facie case for success in the appeal — in the sense that he must demonstrate on *first impression* that the appeal *might* succeed.

[4] In the instant case, there was evidence to support the finding of Ian Chin J that the delay in the listing of the actions was the responsibility of the registry and not the respondents. There was also nothing to indicate that the summons/trial would have been listed more promptly if the respondents had taken the additional step as suggested by the learned judge. This court, in the circumstances, must uphold the respondents' submission that such 'general disinterestedness' as might have existed had no effect on the listings.

[4a] Even if 'general disinterestedness' were established as a sufficient ground for want of prosecution, it would remain necessary for the applicants to establish that the delay was caused by the respondents' conduct, just as it is clearly established under the present law that a plaintiff must exhibit 'inordinate and inexcusable delay'. Clearly, in this case, an attempt to achieve a reversal of the orders of Ian Chin J would not have had any prospect of success.

[5] This court should also be especially cautious in granting leave to appeal herein, since the applications concerned interlocutory appeals arising from decisions refusing to strike out the two actions, which had been affirmed by the Court of Appeal.

[21] On careful perusal of the five questions posed before us, we are inclined to agree with the respondent's contention that the issues raised are not novel point of law as they have been dealt with by this court earlier (see *Sun Kee & Co v Chop Sin Hua Hin & Anor* [1981] 2 MLJ 327; [1981] 1 LNS 18; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133).

[22] At any rate on careful reading at the provisions of s 257(2) of the NLC we do not see any prohibition for the said properties to be offered for sale collectively. Moreover, it would be an exercise of discretion by the court under the particular circumstance of the case whether the lands charged are to be sold individually or collectively. This would be a question of fact only.

[23] We also find that the questions posed would not have the effect of reversing the decision of the Court of Appeal, as from the evidence available, there is no prima facie chance of success for the applicant at the appeal proper even if leave was given.

[24] For the above reasons we find that the applicant has failed to cross the threshold requirement of s 96(a) of the CJA. The applications are therefore dismissed with costs. The deposit is to be given to the respective respondents equally towards account of taxed costs.

Applications dismissed with costs.

Reported by Dzulqarnain Ab Fatar